U.S. Department of Labor

Office of Administrative Law Judges Heritage Plaza Bldg. - Suite 530 111 Veterans Memorial Blvd Metairie, LA 70005



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Issue Date: 16 March 2005

Case No.: 2004-LHC-1153

OWCP No: 10-038118

IN THE MATTER OF

CINDY L. HILL,

Claimant

VS.

DEPARTMENT OF THE ARMY/NAF Employer

APPEARANCES:

KURT A. GRONAU, ESQ.

On Behalf of the Claimant

LAWRENCE P. POSTOL, ESQ.

On Behalf of the Employer/Carrier

BEFORE: RICHARD D. MILLS

Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 et seq., (the "Act" or "LHWCA"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 et seq. The claim is brought by Cindy L. Hill, "Claimant," against the Department of the Army/NAF, "Employer." Claimant alleges that she sustained a neck and right arm injury during her employment with the Department of the Army. Employer/Carrier contests timeliness of notice, causation, nature and extent of disability and medical expenses. A hearing was held on September 2, 2004 in St. Louis, Missouri, at which time the parties were given the opportunity to offer testimony, documentary evidence, and to make oral argument. The following exhibits were received into evidence:

- 1) Claimant's Exhibits Nos. 1-15¹; and
- 2) Respondent's Exhibits Nos. 1-81, 83-92².

Upon conclusion of the hearing, the record remained open for the submission of post-hearing briefs, which were timely received by both parties. This decision is being rendered after giving full consideration to the entire record.³

STIPULATIONS

The Court finds sufficient evidence to support the following stipulations:

- 1) Jurisdiction is not a contested issue. 4
- 2) An employer/employee relationship existed at the time of the accident.⁵
- 3) Claimant was totally disabled on the dates Employer/Carrier paid compensation.⁶

ISSUES

The unresolved issues in these proceedings are:

- (1) Timeliness of Notice;
- (2) Fact of Injury and Causation;
- (3) Nature and Extent of Disability;
- (4) Average Weekly Wage;
- (5) Medical Expenses; and
- (6) Attorney's Fees, Penalties, and Interest.

¹ CX-15 was received into evidence post-hearing upon the agreement of the parties.

² RX-91 and RX-92 were received into evidence post-hearing upon the agreement of the parties.

³ The following abbreviations will be used in citations to the record: JX - Joint Exhibit, CX - Claimant's Exhibit, RX - Employer's Exhibit, and TR - Transcript of the Proceedings.

⁴ TR 5-6.

⁵ TR 5-6.

⁶ TR 47.

SUMMARY OF THE EVIDENCE

I. <u>TESTIMONY</u>

Cindy L. Hill

Claimant, Ms. Hill, is forty-six years old and has a high school education. TR 30. She began working as a flex housekeeper at Fort Leonard Wood in July 1998. TR 33. She worked for five months at minimum wage before being promoted to a full-time housekeeper position. TR 35-37. Ms. Hill testified that as a full-time housekeeper she received a raise to make about \$6.00 per hour. TR 36. After approximately one month, she was again promoted and became a work leader. TR 37. She testified that she was again given a raise to make about \$7.00 per hour. TR 38.

Ms. Hill testified that she was injured at work on August 16, 1999. TR 40. She explained that she was checking the linen room, when a bundle of sheets fell from a shelf seven to eight feet above her head and hit her head, causing her to fall forward. TR 40-41. She testified that she was the only work leader on duty that day and she continued working without telling anyone about her accident. TR 39-41. She explained that she did not think the injury was serious and that there was no supervisor available to whom she could report the accident. TR 41. Ms. Hill testified that she knew the executive housekeeper, Ms. Lewis, would not have sent her to the hospital. TR 126-127. She testified that she experienced a stiff neck and tingling in her fingers the following day, but attributed the pain to sleeping incorrectly. TR 128. She described that her neck pain progressively worsened. TR 129.

Ms. Hill testified that she first saw a doctor for her pain on November 2, 1999, because she had felt an electric pain run from her right neck through her right shoulder when she was lifting a trash bag at work. TR 41-43. She testified that when she saw Dr. Weg on November 12, 1999, she told him about the accident on November 2, 1999 and also told him about the bundle of sheets falling on her. TR 42-44; CX-7, p. 20. She stated that Dr. Weg kept her off work for one week then returned her at light duty. TR 45-48. She testified that she continued receiving treatment for her pain and was experiencing headaches, soreness in the side muscles of her neck, and tingling in her right hand. TR 48. She claimed she told about half of her doctors about the sheets falling on her head, but believes the doctors chose not to write it in the records. TR 130.

Ms. Hill was unclear as to when she realized that the sheets falling on her head had caused her problem. However, she testified that she recalled the exact date of August

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⁷ Ms. Hill admitted reporting prior accidents in May 1999 and September 1999, but explained that her supervisor, Brigitte Pearson, actually reported the first accident and that she only reported the second accident because other work leaders were available to take her place. TR 127.

16, 1999 because it was one of only three or four days where she was the only supervisor on duty. TR 133. She explained that she did not report the August 1999 injury upon realizing that it had caused her problem, because Diane Ashby told her not to report it or else her compensation would be cut off. TR 132, 136-137.

In June 2000, Ms. Hill saw Dr. Kunkel for pain management. TR 56-57; CX-8, p. 88. She testified that he gave her two types of epidural injections in her neck, but that she experienced only minimal relief. TR 57. In July 2000, she saw a neurosurgeon, Dr. Cox. She testified that he told her that if steroid injections did not work, then he would perform surgery to fuse the cervical spine at C5-6 and C6-7. TR 58-59. Ms. Hill testified that she was willing to consider neck surgery if she could return to her normal life. TR 59. She explained that she can no longer do activities that she loves, such as hiking, rock climbing, and activities with her dog. TR 59.

Ms. Hill testified that when she originally returned to work at light duty in November 1999, she was given an assignment in the Maintenance Department. TR 45-48. That same month, the Maintenance Department no longer had work for her, so she was sent home and received compensation. TR 49. Ms. Hill testified that her next light duty work was doing inventory of TVs, VCRs, and refrigerators by reading the serial numbers from them. TR 51-53, 56, 77. Ms. Hill was unclear whether she performed this assignment in June, July or August of 2000. TR 51-54,56; CX-8, p. 88, 112. She testified that she often had to bend in awkward ways to read the serial numbers on the TVs and sometimes had to move the refrigerators, which caused pain to her neck. TR 51-53, 77. She testified that she complained to Rose Lewis, but Ms. Lewis made her complete the job regardless. TR 80. She completed the task in about three weeks. TR 54. She testified that her next light duty job was stuffing invitations into holders for a few days, after which she was not offered another job and did not receive compensation. TR 60. She testified that on July 18, 2000, she went into work and Mrs. Lewis sent her home because she had no work for her. TR 51. She testified that from July/August 2000 through November 2000 she did little jobs, would have days off, and then would come back. TR 61.

In November 2000, she was given a sedentary desk job at Army Community Service ("ACS"). TR 61. The position involved computer work, but she testified that she was only able to type with her left hand and one right finger, because her right hand did not function properly. TR 63-64. She testified that she was in pain and was on OxcyContin and Percocet at the time. TR 63. She explained that she worked through the pain because she liked the job. TR 65. She testified that after about four months she was told that she was no longer needed at ACS, which was the day after the informal conference in this case. TR 66-67.

Two days later, she was given a job in the TV station programming telephones. TR 67. She testified that she performed her job in a tiny room surrounded by boxes of telephones and had difficulty maneuvering because she had no room. TR 67-68. She testified that she could not move the boxes because it was against her doctor's restrictions. TR 68. She testified that she complained to a superior about the lack of work space and that she was required to bend sixteen inches to get the phones out of the box. TR 81. She worked three days. TR 69.

Ms. Hill testified that she next attempted a job at the UEPH Building where she was responsible for loading a cleaning cart and putting sheets and towels in the rooms. TR 71-72. She testified that the cart weighed about 100 pounds when it was loaded and that she had difficulty hanging the towels because the towel bars were above her head. TR 72. On the second day, she also had difficulty maneuvering the cart into the closet and she experienced an "electric shock ripping pain" in her neck through her arm. TR 72-73. She testified that two men had to help her get the cart into the closet. TR 72. She testified that she complained to Dr. Conner on November 9, 2000 and she believed that her supervisors received a copy of her complaints. TR 76. She recalled that she was having difficulty grabbing and holding onto things and that she had been experiencing migraine headaches. TR 73-74. She believed that the date she last worked at Fort Leonard Wood was November 9, 2000. TR 84.

Ms. Hill testified that she filed an EEO complaint in response to being forced to work beyond her medical restrictions and in response to a letter of reprimand she received for creating a disturbance in the workplace. TR 82. An investigation and hearing ensued. TR 81-83. She explained the disturbance arose out of her calling Ms. Lewis a "dingbat," because she would not use her authority to allow her to attend the housekeeper's luncheon. TR 81-82.

She saw Dr. Oro at the University of Columbia in August 2001. TR 84; CX-9, p. 193. He told her that he found nerve root compression at C7 on the CT myelogram. TR 84; CX-9, p. 193. She testified that Dr. Oro told her that surgery was not an option at the time, but could be a possibility in the future. TR 85-86. Ms. Hill testified that in May 2002, she attempted to make money by doing computer work at home, importing goods and selling them on eBay. TR 86. Dr. Conner's records reflected that at this time her symptoms increased after any prolonged sitting, such as driving or working at the computer. TR 86; CX-10, p. 239. Ms. Hill testified that she could sit for about one hour before she experienced significant pain through her neck and shoulder. TR 88. She testified that she did eBay for three to six months in 2002 and made approximately \$3,000. TR 87. Ms. Hill saw Dr. Brandenberg, a neurosurgeon to whom Dr. Peltier

⁸ Ms. Hill recalled that her doctor's restrictions included a five to ten pound lifting maximum and no bending or stretching; she was not to irritate her neck muscles and was to cease working when she was in pain. TR 68-69.

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referred her, on February 28, 2003. TR 89; CX-11, p. 301. She recalled that Dr. Brandenberg wanted to restart her treatment. TR 89-90. She testified that she objected to another CT myelogram due to the extreme pain she suffers from the test and that she and her daughter were angered and upset. TR 90. Ms. Hill testified that Dr. Peltier issued a letter regarding her treatment on August 14, 2003 because he was leaving for Iraq. TR 91. She understood his restrictions to be no bending, no reaching, no repetitive movements, and maximum lifting of ten pounds. TR 92. Ms. Hill testified that she was referred to Dr. Dowling in July 2004 by one of her primary care managers at the army clinic. TR 92-93. She recalled that Dr. Dowling diagnosed her with fibromyalgia, chronic fatigue syndrome, and told her there was no cure. TR 93. He recommended she go to a pain management clinic. TR 93.

Ms. Hill recalled meeting with Ms. Abrams, the vocational rehabilitation specialist. TR 96. She explained why she could not perform the jobs listed by Ms. Abrams. She did not think she could be a convenience store clerk, because should would not be able to stock the store. TR 102-103. She believed she would not be able to sit for the prolonged periods required of a telephone interviewer. TR 103. She testified that she was in pain after sitting for one hour and that as she had been sitting on the witness stand for three hours, her pain had increased. TR 104. She testified that she takes her pain medications three times a day. TR 104. She did not think she could be a library assistant because she would be unable to carry books or push a book cart. TR 105. She also testified that she was unable to hold a phone and write at the same time. TR 107. She testified that she received Ms. Abrams' report the day before the hearing and did not contact any of the listed employers. TR 116-117.

Ms. Hill testified that she attended a Q&A meeting to be a holiday greeter at Wal-Mart, but was told she could not be hired because she was not legally disabled. TR 110. She also testified that she spoke with a woman at McDonalds who told her they could not hire her because their insurance would not cover her preexisting injury. TR 110. Ms. Hill did not submit a formal application to either company. TR 111.

Ms. Hill testified that she feeds her animals and sits with them, but does not do physical activity with them. TR 108. She testified that she does gardening on the days that she can move. TR 121. In response to medical records reflecting that she rode her lawn mower, she explained that she only did it once. TR 121. She testified that when she was running her computer business, she was only at the computer one to two hours per day. TR 122.

II. MEDICAL EVIDENCE: Records and Deposition

1999

Ms. Hill was first seen on November 4, 1999 by Dr. Redman in the Army Hospital Emergency Room. RX-12, p. 2. He recorded a history of "repetitive overhead work; paresthesia to the right hand and arm for more than six weeks." He indicated that the condition was probably caused or aggravated by employment activity and noted that there was no pre-existing injury. RX-12, p. 2. He restricted her from all work beginning on November 5, 1999 and returned her to light work on November 13, 1999. RX-12, p. 2. He recommended that she not use her right arm until she was cleared by an orthopedist. RX-12, p. 2. The request for treatment was completed by Rose Lewis on November 5, 1999 and indicated that Ms. Hill had felt her shoulder pop when lifting her right arm while taking out the trash. RX-12, p. 1.

On November 12, 1999, Ms. Hill was seen by Dr. Weg in the Family Practice Clinic of the Army Hospital. He marked no pre-existing injury and that the current injury was caused by her described work activity. He recommended limited use of her right arm and prescribed pain medications. RX-14, p. 2. He specified authorized her for limited office work or no work until after an orthopedic appointment. RX-14, p. 2.

On November 23, 1999, Ms. Hill was seen by Dr. Noirot, an orthopedist at the Army Hospital. RX-15, p. 1. He marked no pre-existing injury and that the current injury was caused by her described work activity. He authorized Ms. Hill to do desk work for four hours per day with no lifting or overhead activities. RX-15, p. 2.

On December 1, 1999, Ms. Hill was seen by Dr. Smith in Internal Medicine, who restricted her from lifting with her right arm for two months or until cleared by Dr. Noirot. She also restricted her to sitting for four hours per day and no repetitive arm movements. She marked no pre-existing injury and that the current injury was caused by her described work activity. RX-16, p. 2.

2000

On February 15, 2000, Dr. Noirot analyzed the December 28, 1999 MRI and found no obvious disc herniations, but small bulges at C5-6 and C6-7 without impingement of the spinal cord. He restricted Ms. Hill from all lifting and authorized light duty desk work. RX-19, p. 2. He ordered electro diagnostics, which did not evidence abnormalities. CX-7, p. 39.

On February 22, 2000, Dr. Clarke performed an IME on behalf of Employer's carrier. RX-21. He opined that Ms. Hill was experiencing intermittent nerve root radiculopathy and prescribed medication and physical therapy. RX-21, p. 2. He estimated that Ms. Hill would be able to return to her regular employment in three weeks time. RX-21, p. 2. He also noted that she had been taking Prozac for ten years. RX-21, p. 1. He found a normal MRI and no objective neurological deficit and opined that her prognosis was full recovery. He opined that it seemed reasonable that her symptoms were related to her November 2, 1999 injury. RX-21, p. 2.

Dr. Sheppard became Ms. Hill's primary care manager at the Army Hospital, treating her from March 2000 through August 2000. When Dr. Sheppard initially saw Ms. Hill on March 15, 2000, she marked no pre-existing injury and that the current injury was caused by her described work activity. She affirmed Dr. Noirot's existing restrictions. RX-25. On May 5, 2000, Dr. Sheppard changed the restrictions to be only no overhead lifting and marked that she was unsure if the current injury was caused by Ms. Hill's work activity. RX-28. She referred Ms. Hill to Dr. Kunkel, a pain specialist. RX-29. On July 18, 2000, Dr. Sheppard gave restrictions of no driving to or at work, no overhead work and maximum lifting of ten pounds. RX-38; RX-71.

Dr. Kunkel saw Ms. Hill on May 27, 2000 and remarked that the MRI showed small disc protrusions at C5-6 and C6-7, but no encroachment upon the spinal cord. RX-32, p. 1. He noted that she suffered from depression and was on Prozac. RX-32, p. 2. He recommended steroid injections and continuation of physical therapy. RX-32, p. 3. Dr. Kunkel administered a steroid injection on June 21, 2000. RX-35.

Dr. Cox, a neurosurgeon, saw Ms. Hill on July 21, 2000. His records reflect that Ms. Hill included the bundle of sheets falling onto her head in August 1999 in her history and described that she continued to work despite pain through her neck, right shoulder and fingertips until November 1999 when she became physically incapable. Dr. Cox found Ms. Hill's disc herniation to be insignificant. RX-39, p. 1. He recommended cervical epidural steroid injections. If the injections failed, he recommended cervical discectomy and fusion surgery. He advised that she work only light duty and avoid lifting, bending and cleaning. RX-39, p. 2.

The steroid injection administered by Dr. Kunkel was unsuccessful, so he administered facet joint injections on August 1, 2000. On August 7, 2000, Dr. Sheppard specified that Ms. Hill avoid overhead work and lift no greater than ten pounds and no cleaning as per Dr. Cox's restrictions. CX-8, p. 108.

Dr. Conner became Ms. Hill's primary care manager at the Army Hospital in August 2000. At her initial visit on August 10, 2000, Ms. Hill described the incident where the bundle of sheets fell on her head, and Dr. Conner recorded it as a cause of her

injury. RX-50, p. 1. He restricted her from bending her neck and lifting greater than ten pounds and recommended she do desk work, filing, or typing. RX-50, p. 3. On August 31, 2000, Dr. Conner noted that Ms. Hill's myelogram showed she had C6-7 nerve root impingement. CX-8, p. 129. When Dr. Conner was consulted on November 9, 2000, regarding Ms. Hill's light duty work assignments, he explained that she can do light office work "such as collating, stuffing binders, and fire evacuation drawings provided she has proper workspace and does not need to lift boxes of supplies." He noted that she can fold towels, but cannot pick up towels. He also specified that Ms. Hill had been instructed to stop and seek assistance if she was asked to perform a task that causes her pain. RX-53. On November 27, 2000, Dr. Conner diagnosed Ms. Hill with chronic neck pain and shoulder pains, and he ordered neurosurgical evaluation. RX-61.

2001

On February 13, 2001, Dr. Conner noted that Ms. Hill had depression with worsening psychosocial stressors, and he increased her Prozac dosage. CX-9, p. 162.

Dr. Kennedy is a neurosurgeon who conducted an IME on behalf of Employer on June 19, 2001. He found surgery unnecessary as there was no evidence of nerve root compression. He advised that she was not likely to benefit from any further treatment and that she be tapered off of narcotic pain medication. He recommended an FCE to determine her physical restrictions. RX-58. The FCE results placed Ms. Hill in the light work demand level. The FCE reported inconsistencies that indicated symptom magnification behavior. She described her pain as 10/10 at all times and exhibited severe over-guarding. RX-59. Dr. Kennedy opined that this report rendered her symptoms entirely subjective. He also opined that Ms. Hill was capable of working as a cashier, hotel desk clerk and even in her normal housekeeping capacity. RX-60. He opined that Ms. Hill was capable of driving up to one hour each way for work. RX-89.

Ms. Hill was seen by a neurosurgeon, Dr. Oro, on August 31, 2001. RX-63. He diagnosed long standing neck and right arm pain, but was uncertain whether the C7 nerve root compression was causing pain. He noted that her neck rigidity and spasms may be related to cervical whiplash. RX-63, p. 2. Dr. Oro referred Ms. Hill to Dr. Horowitz for EMG and nerve conduction studies to localize the problem. RX-63, p. 2.

2002

Dr. Oro again saw Ms. Hill on February 22, 2002. He advised against surgery, because the myelogram reflected only mild evidence of nerve root compression at C7 and the EMG revealed no radiculopathy. He referred her to a pain clinic for further evaluation and treatment. CX-10, p. 220.

Dr. Conner continued to see Ms. Hill, consistently recording chronic neck pain and migraine headaches. RX-64, p. 1-8. On April 2, 2002, Dr. Conner noted that "patient will not be able to return to any type of employment that will involve bending, lifting, reaching or stretching." RX-64, p. 6. On April 10, 2002, Dr. Conner issued a memorandum noting that Ms. Hill could do desk or computer-based work. RX-74. On May 10, 2002, Ms. Hall reported that her symptoms of numbness and tingling in her right arm occur when she does prolonged sitting, such as driving or working at a computer. RX-64, p. 7. Dr. Conner noted that Ms. Hall had been using the computer frequently for her computer-based home business. RX-64, p. 7.

Dr. Peltier was Ms. Hill's primary care manager from August 2002 through September 2003. RX-64, p. 9-29. He noted chronic neck and shoulder pain, migraine headaches, and depression. He again had her evaluated for surgery, but she was not a surgical candidate. RX-64, p. 19.

2003

On February 28, 2003, Ms. Hill was seen by Dr. Brandenberg, a neurosurgeon. Dr. Brandenberg opined that Ms. Hill's MRI did not explain her symptoms and that her pain was myofascial in origin. He did not believe surgery to be an option. He noted that Ms. Hill became belligerent with him when he suggested that they start again from ground zero. CX-11, p. 301-302.

On March 7, 2003, Dr. Peltier wrote that Ms. Hill suffered from severe depression. CX-11, p. 305. On August 14, 2003, Dr. Peltier wrote a general letter concerning Ms. Hill's treatment and condition because he was leaving for Iraq and would no longer be treating her. TR 92. In the letter, he opined that her pain and limited range of motion stemmed from her initial injury at work on August 16, 2003 and that the accident had severely limited her ability to perform most types of physical labor. CX-11, p. 345.

2004

Dr. Kitchens, a neurosurgeon, conducted an IME on behalf of Employer on July 8, 2004. Dr. Kitchens opined that the mechanism of Ms. Hill's injury would not cause a disc herniation nor would it cause the profound body pain she reports. He stated that the accidents reported by Ms. Hill did not injure, damage, or weaken her cervical spine, her discs, or her vertebrae, as the MRI and CT-myelogram showed no evidence of an acute injury. He also opined that her complaints were entirely subjective and could not be explained by any medical diagnosis. He remarked that she had no limitations on her ability to work. RX-77.

Dr. Dowling, a neurosurgeon, saw Ms. Hill on July 22, 2004. He opined that Ms. Hill suffered from diffuse myofascial pain affecting her neck and from diffuse joint pain. He found that the MRI revealed only mild degenerative disc changes and believed her level of pain to be out of proportion to the MRI findings. He opined that she may have opiate-induced hypersensitivity from the prescription of chronic narcotics. He opined that she was not a surgical candidate, and recommended a comprehensive pain management evaluation at the Pain Management Center at Washington University. CX-14. Dr. Dowling also noted in correspondence with Employer's counsel that he could not make a determination as to whether Ms. Hill's complaints of pain were related to her work injury as it had occurred several years prior. RX-92.

Correspondence and Deposition of Stephen Conner, M.D.

Employer sent Dr. Conner medical reports of Drs. Clarke, Ferguson, Kennedy, Brandenberg and Kitchens and asked him to respond to three questions. Dr. Conner answered each question in the affirmative: agreeing that Ms. Hill can do light duty work, that she can perform her regular housekeeping job, and that her subjective complaints were not explained by her work injury. However, Dr. Conner added that although her work injuries do not explain her subjective complaints and were not causative by themselves, they served as "triggers" for her complaints. RX-91.

Dr. Conner was subsequently deposed on November 22, 2004. He testified that he was Ms. Hill's primary care manager at the Fort Leonard Wood clinic from August 2000 through June 2002; Ms. Hill had transferred her enrollment to him from Dr. Sheppard. CX-15, p. 8. Dr. Conner recalled that he had treated Ms. Hill for shoulder pain and depression. CX-15, p. 9. He agreed that she had longstanding neck pain, but was uncertain as to what was contributing to her pain. CX-15, p. 12. He testified that he had not necessarily seen any evidence of C7 nerve root compression. CX-15, p. 12. Dr. Conner testified that over the period of time that he treated Ms. Hill, he did not see any change in her neck rigidity and neck pain. CX-15, p. 12-13. He testified that the amount of pain Ms. Hill was experiencing was out of proportion to any physical or x-ray findings. CX-15, p. 13. He stated that Ms. Hill had told him about the sheets falling on her head and that he believed her to be truthful and never found any evidence that she was a malingerer. CX-15, p. 13-14. Dr. Conner testified that Dr. Peltier assumed his patient panel when he left Fort Leonard Wood. CX-15, p. 16. After reviewing Dr. Peltier's records, Dr. Conner agreed that Ms. Hill had chronic neck pain, but recalled only a C7 herniation, which he was not convinced was causing her pain. CX-15, p. 16. Dr. Conner testified that he would agree with Dr. Dowling's recommendation that Ms. Hill undergo comprehensive pain management. CX-15, p. 19. Dr. Conner testified that while Ms. Hill was under his care, he felt that she could perform desk duties, such as answering telephones, typing, and other clerical work. CX-15, p. 21. Dr. Conner explained that when he wrote in his correspondence with Employer's attorney that Ms.

Hill's work injuries served as a trigger, he meant that the pain is real for her due to the injuries, whether the injuries themselves caused the pain or whether at a conscious or subconscious level she associates her pain with those injuries. CX-15, p. 24. When asked about the reasonableness of Ms. Hill's delay in reporting the August 1999 injury, Dr. Conner responded that in his clinical experience people sometimes self-medicate expecting the pain to go away and only seek medical care when the pain persists for a period of time they find unacceptable. CX-15, p. 26.

III. VOCATIONAL EVIDENCE

Donna Abram

Ms. Abram, a vocational rehabilitation counselor retained by Employer, interviewed Ms. Hill on July 7, 2004. TR 145. She obtained her educational background and work history. She noted that Ms. Hill did not mention that she ran a home-based computer business in 2002, but only indicated that she used the computer to research information on the internet. TR 148. Ms. Abram attempted to give Ms. Hill a general aptitude test, but Ms. Hill was unable to complete the testing. Ms. Abram perceived that Ms. Hill experienced agitation due to the interview, causing her pain level to rise and her whole body to clinch. TR 170. She testified that she could see that Ms. Hill was in pain during the interview and could notice when her pain medications were wearing off. TR 165, 169.

Ms. Abram conducted a labor market survey and found 24 positions that she felt were medically and vocationally suitable for Ms. Hill. RX-79. There were two jobs available at Smitty's, one as a cashier at the convenience store and one as a cashier at the grocery store. TR 149. She testified that she spoke with a manager who was clear that the employee would be able to sit or stand and move around and that there was no stocking involved. TR 149. She also noted that the jobs had a high turnover and there were also positions available in 2000, 2001, 2002, and 2003. TR 150. The third position Ms. Abram indicated was as a research telephone interviewer at Communications for Research; a headset could be provided and employee could change positions. TR 150. She specified that this position was different than a sales telemarketing position, which was more rigid, had scheduled breaks, and did not allow the employee to move around. TR 152. The fourth position indicated was as an administrative clerk at U.S. Food Services. TR 152. It was a desk position, but would allow her to change positions and tasks when needed. TR 152. Ms. Abram next indicated a light assembly position at Modine Heat Transfer. TR 153. The contact told Ms. Abram that the employee would be able to move around and that the duties were within Ms. Hill's limitations. TR 153. The next position was as a part-time cashier at Oasis Truck Plaza and would allow her to sit or stand. TR 153-154.

Ms. Abrams indicated a part-time library clerk position at the Waynesville Library, which required only checking books in and out; there was no stocking books or pushing heavy carts. TR 154. Ms. Abrams found five front desk clerk positions at various hotels. The jobs would allow her to sit or stand and move around. TR 155. She was specifically informed by each of the employers that a front desk clerk would never be required to do any housekeeping duties. TR 156. Ms. Abrams found three office assistant jobs that required basic clerical skills, answering phones and filing and would allow her to sit, stand and move around. TR 156. Ms. Abrams indicated four cashier positions that did not require any lifting. TR 157. Ms. Abrams indicated a position as a cashier clerk at PEA Express Personnel Services. TR 158. She described it as a customer service desk job where she would be allowed to move around. TR 158. Ms. Abrams indicated four rental clerk positions for storage unit companies that would be office jobs where she could vary her duties. TR 161.

Ms. Abram testified that she considered pain in determining job suitability only to the extent that the doctors placed physical limitations on Ms. Hill as a result of her pain. TR 161-162. Ms. Abram believed that most of the jobs listed could be done one-handed while some jobs might require minor accommodations. TR 167. Ms. Abram testified that she was not provided any medical records suggesting that Ms. Hill had been diagnosed with depression. TR 175. She testified that the last medical report she saw was Dr. Conner's report dated April 10, 2002. TR 179-180. However, she reviewed Dr. Dowling's report of July 22, 2004 and Dr. Peltier's report of August 1, 2003 and opined that her findings remained unchanged. TR 181-182.

IV. <u>OTHER EVIDENCE</u>

Recorded Statement of Cindy Hill

Cindy Hill recorded a statement on December 9, 1999 regarding her job injury of November 2, 1999. Cindy Hill stated that she felt her right arm pop when she went to lift a thirty gallon trash bag over her head into the dumpster. She stated that she reported her injury to her supervisor Brigitte Pearson and then went to the emergency room. She stated that she had never had an injury to her neck or back at work before. She stated that she intended to go back to work when the doctor released her. RX-9.

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⁹ The positions were at Best Western Coachlight, Holiday Inn Express-Rolla, Lodge of Four Seasons, Wyota Best Western, and Holiday Inn Express-Lebanon.

¹⁰ The positions were at Pathways Community Health, Community First CRM and A&A Pest Control Technology.

¹¹ The positions were at Convenient Mini-Marts, B&D Auto Truck Plaza, Mobile On The Run, and CB's Mini Mart.

¹² The positions were at West Waynesville Self Storage, Bates Self Service Storage, Discount Storage and Oakwood Quick Shop.

Cindy Hill's LS-203 of September 10, 2000

Ms. Hill's claim for compensation filed on September 10, 2000 contained a claim that she was first injured on August 16, 1999 when a bundle of sheets fell from an upper shelf, struck the top of her head, and caused her head to jerk backwards. RX-5.

Written Statement of Brigitte Pearson

On September 21, 2000, Ms. Pearson wrote that she did not recall Cindy Hill telling her that a bundle of sheets fell on her head in August 1999. RX-10.

Written Statement of Rose Lewis

On September 21, 2000, Ms. Lewis wrote that Cindy Hill had reported three accidents since her employment with lodging: May 17, 1999, September 21, 1999, and November 4, 1999. On November 4, 1999, she reported to Brigitte Pearson that she had hurt her neck, shoulder and arm while throwing trash into a dumpster. RX-11.

Written Declaration of Rose Lewis dated July 13, 2001

Ms. Lewis, the Executive Housekeeper, stated that at the time Ms. Hill was given the task of taking inventory of the TV's and VCR's, her only limitation was no overhead work. She stated that Ms. Hill was instructed not to move anything heavy and to make a list of the room numbers where she was unable to obtain the serial numbers. RX-81, p. 4.

Ms. Lewis stated that Ms. Hill was not told to go home on July 18, 2000. She recalled that she told Ms. Hill she would find light duty for her after she finished the job with Mr. McCoy (Maintenance Department), but Ms. Hill complained that all of the jobs hurt her. RX-81, p. 4.

Ms. Lewis stated that Ms. Hill was contacted on August 8, 2000 and offered light duty work. Ms. Hill responded on August 9, 2000 that she was taking sick leave because her neck hurt. Ms. Hill was again offered light duty work on August 10, 2000, but did not come to work and requested "leave without pay" status. Ms. Lewis declared that Ms. Hill was offered light duty work believed to be within Dr. Conner's August 10, 2000 restrictions of no bending of neck, maximum lifting of ten pounds, and only clerical or desk work. RX-81, p. 3.

Ms. Lewis stated that Ms. Hill was assigned to stuff plastic cubes on September 12, 2000. She stated that Ms. Hill started working on a daily basis on September 15, 2000. RX-81, p. 7. Ms. Lewis stated that Ms. Hill was tasked to phone programming on November 3, 2000, and the task was believed to be within her limitation of no bending of neck, maximum lifting of ten pounds, and only clerical or desk work. RX-81, p. 6.

Written Statement of Supervisor Jim Nunley

Mr. Nunley reported that he was contacted on November 3, 2000 because Ms. Hill refused to complete her task of programming telephones, claiming it was beyond her physical limitations. He went to the site and demonstrated to Ms. Hill how to perform the task without bending her neck or using her right arm. He explained to Ms. Hill that the task was within her physical restrictions of lifting less than ten pounds and not bending her neck. Ms. Hill still insisted she could not do the task. Ms. Lewis then prepared a letter to Ms. Hill's doctor listing the tasks she was to perform and inquiring if the assignments were within her medical restrictions. The letter was sent on November 6, 2000. The response was received on November 9, 2000. Mr. Nunley stated that each subsequent attempt to provide Ms. Hill with light duty assignments was met with requests for sick leave or complaints that the task caused her pain. He explained that it became so problematic that they ceased offering her assignments by the end of November 2000. RX-57.

Separation for Abandonment of Position Memorandum

On May 2, 2002, Rose Lewis wrote a letter notifying Ms. Hill of her pending separation from her position as custodial work leader as a result of abandonment of the position, which was to be effective May 10, 2002. Ms. Lewis noted that she had requested Ms. Hill to report to her on October 12, 2001 for work instructions, pursuant to Dr. Kennedy's authorization for her to work. Ms. Hill had failed to report or contact Ms. Lewis, and she had not provided any medical documentation to support her continued absence from duty on leave without pay. CX-4.

Employer's Records

Employer paid Claimant temporary total disability compensation from November 15, 1999 through November 25, 1999 and from November 30, 1999 through May 17, 2000. RX-1. Employer's LS-210 forms reflect that Ms. Hill was disabled from November 5, 1999 through May 18, 2000, returning to work on May 18, 2000; from July 14, 2000 through August 18, 2000; and from August 8, 2000 through September 7, 2000, returning to work on September 11, 2000. RX-31; RX-40; RX-49.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The following findings of fact and conclusions of law are based upon the Court's observations of the credibility of the witnesses, and upon an analysis of the medical records, applicable regulations, statutes, case law, and arguments of the parties. As the trier of fact, this Court may accept or reject all or any part of the evidence, including that of expert medical witnesses, and rely on its own judgment to resolve factual disputes and conflicts in the evidence. See Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962). In evaluating the evidence and reaching a decision, this Court applies the principle, enunciated in Director, OWCP v. Greenwich Collieries, 114 S.Ct. 2251 (1994), that the burden of persuasion is with the proponent of the rule. The "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, will not be applied, because it violates § 556(d) of the Administrative Procedure Act. See Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 281, 114 S.Ct. 2251, 2259, 129 L.Ed. 2d 221 (1994).

JURISDICTION

The parties have not contested jurisdiction in this case. Claimant allegedly suffered injury while working as a civilian employee at Fort Leonard Wood. The parties agree that such injuries are covered by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171, et seq., 5 U.S.C. § 2105. Accordingly, the Court finds jurisdiction proper for this case.

TIMELINESS

Section 12(a) of the Act provides in part:

Notice of an injury or death in respect of which compensation is payable under this chapter shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment.... Notice shall be given (1) to the deputy commissioner in the compensation district in which the injury or death occurred, and (2) to the employer. 33 U.S.C. § 912(a).

Pursuant to § 12(b) of the Act, such notice shall be in writing and include the employee's name and address and a statement of the time, place, nature, and cause of the injury. 33 U.S.C. § 912(b). Pursuant to § 12(d) of the Act, failure to give formal notice shall not bar the claim if (1) the employer or carrier had knowledge of the injury or death, (2) the employer or carrier has not been prejudiced by the claimant's failure to give such notice. or (3) the failure is excused on the grounds that (i) notice was provided, but to the wrong official, with no prejudicial effects, or (ii) some satisfactory reason exists that notice could not be provided. 33 U.S.C. § 912(d). In the absence of evidence to the contrary, it is presumed, pursuant to Section 20(b) of the Act, that the employer has been given sufficient notice under Section 12. See 33 U.S.C. § 920(b); Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203 (1991); Shaller v. Cramp Shipbuilding and Dry Dock Co., 23 BRBS 140 (1989). Accordingly, the employer bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim or to provide medical services due to the claimant's failure to provide adequate notice. See Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203; Bivens v. Newport News Shipbuilding and Dry Dock Co., 23 BRBS 233 (1990); Strachan Shipping Co. v. Davis, 571 F.2d 968, 972 (5th Cir. 1978). A generalized claim of not being able to investigate while the claim is fresh is insufficient to prove prejudice. See Ito Corp. v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989).

In this case, Employer asserts that Claimant failed to timely provide notice of her August 16, 1999 injury. Claimant testified that she experienced progressively worsening pain in her neck, shoulder and arm after her August 16, 1999 accident, but initially attributed the pain to sleeping incorrectly. TR 128. She was then re-injured on November 2, 1999 when she experienced an electric pain through her right neck, shoulder and arm while lifting a trash bag into a dumpster, at which point she sought medical treatment through Employer's clinic. TR 41-43. It is unclear exactly when Claimant became aware of a relationship between her August neck and arm injury and her employment; the medical records reflect July 21, 2000 as the first instance Claimant reported the injury, and Claimant did not include it in her formal claim until September 10, 2000. RX-5; RX-39. However, the Court finds that because Claimant timely reported the November injury, Claimant's untimely notice of the August injury had no prejudicial effect upon Employer. Claimant returned to work after the August injury and worked without disability until the injury in November. The November injury was immediately examined by a doctor and affected the same part of Claimant's body as the August injury. Moreover, Employer's general claim that it was prejudiced because it was unable to conduct witness interviews of the August injury is not persuasive. Such a conclusory statement is not substantial evidence establishing prejudice. See Ito Corp. v. Director, OWCP, 883 F.2d 422, 22 BRBS 126 (CRT) (5th Cir. 1989). While Claimant failed to meet the formal notification requirements of § 12(a) for both injury dates, Employer had knowledge of the November 2, 1999 injury on November 5, 1999 when it authorized Claimant's medical treatment for injury to her right arm and shoulder.

Additionally, Employer was not prejudiced by Claimant's failure to report the August 16, 1999 injury. CX-7, p. 18. Therefore, the Court finds that Claimant's untimely notice of injury is excused pursuant to § 12(d) and will consider Claimant's claim to be timely for purposes of the Act.

Section 13(a) of the Act states:

Except as otherwise provided in this section, the right to compensation for disability or death under this chapter shall be barred unless a claim therefore is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware of the relationship between the injury or death and the employment. 33 U.S.C. § 913(a).

A claimant does not sustain an "injury" for § 13(a) purposes until he knows or should have known that the accident he has suffered will likely impair his wage-earning capacity. See Stancil v. Massey, 436 F.2d 274, 276-77 (D.C. Cir. 1970); Newport News Shipbuilding and Dry Dock Co. v. Parker, 935 F.2d 20, 24-27, 24 BRBS 98 (CRT) (4th Cir. 1991). For cases in which compensation is paid without an award, the right to disability benefits is barred unless a claim is filed within one year of the date of the last voluntary payment. See Peterson v. Washington-Metro. Area Transit Auth., 17 BRBS 114 (1984). Neither the Act nor the Rules and Regulations governing the application of the Act discuss the form in which a claim must be filed. Thus any letter or notice from which it may be inferred reasonably that a claim for compensation is being made is sufficient. Id. at 116. It is well-established that an attending physician's report, which indicates the possibility of a continuing disability, filed within one year after the termination of voluntary payments, is adequate compliance with the filing requirements of Section 13(a). Id.; Chong v. Todd Pacific Shipyards Corp., 22 BRBS 242 (1989).

In this case, Employer also asserts that Claimant's claim is barred because it was not filed within one year of the injury. Claimant filed her claim on September 10, 2000 and included both the August 16, 1999 and November 2, 1999 injuries. Claimant clearly did not know the August 16, 1999 injury would impair her earning capacity until November 4, 1999 at the earliest, the first date a doctor restricted her from her regular employment. Therefore, Claimant filed her claim for both injuries within one year of

becoming aware that the injuries would impair her wage-earning capacity. Thus, both claims were timely filed.

FACT OF INJURY AND CAUSATION

The claimant has the burden of establishing a *prima facie* case of compensability. He must demonstrate that he sustained a physical and/or mental harm and prove that working conditions existed, or an accident occurred, which could have caused the harm. Graham v. Newport News Shipbuilding & Dry Dock Co., 13 BRBS 336, 338 (1981); U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP, 455 U.S. 608, 616, 102 S.Ct. 1312, 1318, 71 L.Ed. 2d 495 (1982). Once the claimant establishes these two elements of his *prima facie* case, § 20(a) of the Act provides him with a presumption that links the harm suffered with the claimant's employment. See Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981); Hampton v. Bethlehem Steel Corp., 24 BRBS 141, 143 (1990). When an employee sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability and for medical expenses during both injuries if the subsequent injury is the natural and unavoidable result of the original work injury. See Atlantic Marine v. Bruce, 661 F.2d 898, 901, 14 BRBS 63,65 (5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454, 456-57 (9th Cir. 1954); Mijangos v. Avondale Shipyards, 19 BRBS 15, 17 (1986).

After the § 20(a) presumption has been established, the employer must introduce "substantial evidence" to rebut the presumption of compensability and show that the claim is not one "arising out of or in the course of employment." 33 U.S.C. §§ 902(2), 903. Only after the employer offers substantial evidence does the presumption disappear. Del Vecchio v. Bowers, 296 U.S. 280, 286, 56 S.Ct. 190, 193 (1935). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept to support a conclusion. Sprague v. Director, OWCP, 688 F.2d 862, 865 (1st Cir. 1982). In order to rebut the presumption, employer must introduce "specific and comprehensive" evidence to sever the connection between claimant's injury and his employment. Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), cert denied, 429 U.S. 820 (1976). If the employer meets its burden, the presumption disappears, and the issue of causation must be resolved based upon the evidence as a whole. Kier v. Bethlehem Steel Corp. 16 BRBS 128, 129 (1984); Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15, 21 (1991).

Claimant asserts that she suffered injury to her neck, shoulder and arm due to her employment at Fort Leonard Wood. The medical evidence in this case supports her assertion. Dr. Redman initially found paresthesia to the right hand and arm, MRIs revealed small disc protrusion at C5-6 and C6-7, and Dr. Conner diagnosed her with chronic neck and shoulder pain. RX-12; RX-32; RX-53. Claimant also demonstrated that two accidents occurred at work that could have caused the injury. The Court accepts

Claimant's testimony that sheets fell on her at work on August 16, 1999, because the Court found her to be truthful in recounting this event. Additionally, the Court is swayed by Dr. Conner's testimony that Claimant reported the incident to him, that he believed her to be truthful, and that he never found her to be a malingerer. CX-15, p. 13-14. Claimant also established that an accident occurred on November 2, 1999 when she was lifting trash into a dumpster. She sought medical treatment on November 4, 1999 and reported the incident. Rose Lewis wrote a statement that Claimant had reported the accident to her supervisor. RX-11. Therefore, the Court finds that Claimant established a *prima facie* case of compensability and is entitled to the § 20(a) presumption.

The Court finds that Employer did not produce substantial evidence sufficient to rebut the § 20(a) presumption. Employer relies on the lack of evidence regarding the August 16, 1999 accident and upon Dr. Kitchens' opinion that the work injury and Claimant's neck complaints are not causally related. First, even had the August 16, 1999 accident not occurred, Claimant still proved that she was injured in the course of her employment on November 2, 1999. Second, Dr. Kitchens' opinion alone is not sufficient to sever the connection between Claimant's injury and her employment. Dr. Kitchens was an independent medical examiner, who saw Claimant in July 2004, nearly five years after her original injury. RX-77. His opinion reflects that he discredited Claimant's subjective complaints of pain and considered only that the objective findings did not show radiculopathy, spinal cord injury or acute injury to her spine, spinal cord or nerves. RX-77. Therefore, the Court finds that his ultimate opinion, that the mechanism of injury would not cause a disc herniation nor her reported pain, was conclusory in nature. Dr. Kitchens did not include an explanation as to why her work accidents could not have caused her disc herniations or her pain.

The Court additionally finds that even if Employer had rebutted the § 20(a) presumption, the evidence as a whole resolves in favor of Claimant to establish causation. Drs. Redman, Weg, Noirot and Smith all treated Claimant in 1999 and indicated in their records that her physical condition was caused by her work activity. RX-12, p. 2; RX-14, p. 2; RX-15, p. 2; RX-16, p. 2. The medical records reflect that these doctors based their finding of a causal relationship solely on the November 2, 1999 injury, rendering moot the dispute whether the August 1999 injury actually occurred. In comparison, the Court places less weight on Dr. Kitchens' opinion than on Claimant's original physicians at the Army Clinic. For the foregoing reasons, the Court finds that Claimant has established causation between her injury and her employment.

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¹³ As discussed above, the Court accepts Claimant's testimony that the August 1999 accident did occur based on the Court's perception and Dr. Conner's perception of Claimant's credibility on this issue.

NATURE AND EXTENT OF DISABILITY

Disability under the Act means, "incapacity as a result of injury to earn wages which the employee was receiving at the time of injury at the same or any other employment." 33 U.S.C. § 902(10). Therefore, in order for a claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Under this standard, an employee will be found to have no loss of wage earning capacity, a total loss, or a partial loss. The burden of proving the nature and extent of disability rests with the claimant. Trask v. Lockheed Shipbuilding Constr. Co., 17 BRBS 56, 59 (1980).

The nature of a disability can be either permanent or temporary. A disability classified as permanent is one that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. SGS Control Servs. v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, 17 BRBS at 60. Any disability suffered by the claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metro. Area Transit Auth., 16 BRBS 231 (1984); SGS Control Servs., 86 F.3d at 443.

The date of maximum medical improvement is the traditional method of determining whether a disability is permanent or temporary in nature. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235 n.5, (1985); Trask, 17 BRBS at 60; Stevens v. Lockheed Shipbuilding Co., 22 BRBS 155, 157 (1989). The date of maximum medical improvement is the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. This date is primarily a medical determination. Manson v. Bender Welding & Mach. Co., 16 BRBS 307, 309 (1984). It is also a question of fact that is based upon the medical evidence of record, regardless of economic or vocational consideration. Louisiana Ins. Guar. Ass'n. v. Abbott, 40 F.3d 122, 29 BRBS 22 (CRT) (5th Cir. 1994); Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamic Corp., 10 BRBS 915 (1979).

Although no physician has specified a date of maximum medical improvement for Claimant, the Court finds there is substantial evidence establishing that Claimant's condition has persisted for a lengthy period with no anticipated improvement. Dr. Peltier noted in his letter dated August 14, 2003 that he had seen no change in Claimant's condition in the past twelve months and that he had treated her over this period without any real progress. CX-11. Dr. Conner testified at his deposition that over the period he treated Claimant from August 2000 through June 2002, he did not see any change in her

neck rigidity and neck pain. Moreover, Ms. Hill saw six neurosurgeons, all of whom opined that she was not a surgical candidate. Therefore, the Court finds August 14, 2003, the date on which Dr. Peltier opined that he had seen no improvement in Claimant's condition, to be the date of maximum medical improvement and, thus, the date the Claimant's disability became permanent.

The extent of disability can be either partial or total. To establish a prima facie case of total disability, the claimant must show that he cannot return to his regular or usual employment due to his work related injury. See Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989); Harrison v. Todd Pac. Shipyards Corp., 21 BRBS 339 (1988). Total disability becomes partial on the earliest date that the employer establishes suitable alternative employment. Rinaldi v. General Shipbuilding Co., 25 BRBS 128 (1991). To establish suitable alternative employment, an employer must show the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried. New Orleans Stevedores v. Turner, 661 F.2d 1031 (5th Cir. 1981); McCabe v. Sun Shipbuilding & Dry Dock Co., 602 F.2d 59 (3d Cir. 1979). For the job opportunities to be realistic, however, the employer must establish their precise nature, terms, and Thompson v. Lockheed Shipbuilding & Constr. Co., 21 BRBS 94, 97 availability. (1988). Additionally, an employer can meet its burden of establishing suitable alternate employment by offering the claimant a job in its facility, including a light duty job. Spencer v. Baker Agricultural Co., 16 BRBS 205 (1984); Darden v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 224 (1986). A failure to prove suitable alternative employment results in a finding of total disability. Manigault v. Stevens Shipping Co., 22 BRBS 332 (1989). If the employer meets its burden and shows suitable alternative employment, the burden shifts back to the claimant to prove a diligent search and willingness to work. See Williams v. Halter Marine Serv., 19 BRBS 248 (1987). If the employee does not prove this, then at the most, his disability is partial and not total. See 33 U.S.C. § 908(c); Southern v. Farmers Export Co., 17 BRBS 64 (1985).

Claimant has established a *prima facie* case of total disability, because she cannot return to her usual employment as a housekeeper. The last restrictions given by Dr. Conner were in his April 2, 2002 letter where he wrote that Claimant would not be capable of employment that involves bending, lifting, reaching or stretching. RX-64, p. 6. He wrote a memorandum on April 10, 2002 explaining that it was "unlikely that she will be able to perform any work requiring lifting or manual labor." RX-74. Moreover, Dr. Peltier wrote on August 14, 2003 that the accident had severely limited Ms. Hill's ability to perform most types of physical labor. CX-11. The job description for a custodial worker included the ability to handle objects weighing up to forty pounds and

¹⁴ Claimant saw Dr. Cox, Dr. Kennedy, Dr. Oro, Dr. Brandenburg, Dr. Kitchens, and Dr. Dowling. RX-39; RX-58; RX-63; CX-11, p. 301-302; RX-77; CX-14.

requirements of reaching and bending. CX-7. The Court finds it clear that the physical requirements of a housekeeper exceed Ms. Hill's capabilities as described by Dr. Conner and Dr. Peltier. Employer offers the opinions of Dr. Kennedy and Dr. Kitchens that Claimant is capable of performing housekeeping duties. However, the Court does not find these opinions conclusive, as there is no evidence that the doctors were aware of the physical requirements of a housekeeper, and each doctor's opinion is countered by the findings of other neurosurgeons who treated Claimant during the same time period. In late 2001, Ms. Hill was seen by neurosurgeon, Dr. Oro, who noted neck rigidity and spasms, which Dr. Kennedy did not record. RX-63. In July 2004, Dr. Dowling issued a medical opinion finding that Ms. Hill suffered from diffuse myofascial pain and joint pain and needed pain management evaluation, which conflicted with Dr. Kitchens' opinion. RX-92. Given the variances in the independent medical opinions, the Court places greater reliance on the original documented opinions of Dr. Conner and Dr. Peltier. Therefore, the Court finds that Claimant is no longer able to perform her regular employment as a housekeeper.

The Court finds that Employer has established suitable alternative employment by offering Claimant suitable light duty jobs in its facility. Claimant was first offered a light duty job, which she declined, on August 8 and August 10, 2000. RX-81, p. 3; RX-46. Ms. Lewis stated that she spoke with Claimant on these dates and notified her that there was light duty work available. RX-81, p. 3. The Court finds that Claimant was capable of light duty work on August 10, 2000 as per Dr. Conner's recommendation of that date that she could do desk work, filing or typing, with no neck bending and no lifting greater than ten pounds. RX-50, p. 3. Therefore, the Court finds that when Claimant declined Employer's offer of light duty work on August 10, 2000, she declined suitable work and suffered no economic disability.

Claimant returned to work on September 11, 2000 and worked in a light duty capacity until she again declined Employer's offer of suitable light duty work. On November 3, 2000, Claimant refused to complete an assignment programming telephones, claiming it was beyond her physical restrictions, because the workspace was too small and she was required to bend sixteen inches to lift each phone out of the box. RX-57; TR 67-69. Ms. Lewis, the executive housekeeper, stated in her written declaration that the telephone programming assignment was believed to be within Dr. Conner's restrictions. RX-81, p. 6. The restrictions were no bending the neck and no

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¹⁵ The Court is aware that Dr. Conner subsequently acknowledged in his correspondence with Employer's attorney that he agreed with the opinions of Dr. Kitchens and Dr. Kennedy that Ms. Hill was capable of performing housekeeping duties; however, he qualified the response, by noting that he did not have the benefit of reviewing his original notes of her treatment. RX-91. Therefore, the Court cannot give weight to Dr. Conner's opinion in this correspondence. Additionally, Dr. Conner was not asked during his deposition to verify that he believed Ms. Hill capable of performing housekeeping duties, and regarding her ability to work, he only noted that while she was under his treatment he found her capable of performing desk duties. CX-15, p. 21. Therefore, the Court does not find Dr. Conner to be in concurrence with the opinion that Ms. Hill is capable of performing housekeeping duties.

lifting greater than ten pounds; she was authorized to do desk work, filing or typing. RX-50, p. 3. Supervisor Jim Nunley stated in his declaration that when Ms. Hill complained, he demonstrated to her how to perform the task without bending her neck or using her right arm. RX-57. Claimant maintained that the task was beyond her physical restrictions. Supervisor Nunley sought clarification of Ms. Hill's restrictions from Dr. Conner, who approved light office work with proper workspace and clarified that she could not lift boxes of supplies. RX-53; RX-57. Claimant was placed on "leave without pay" status on November 15, 2000 due to her failure to cooperate. CX-3.

The Court finds that the telephone programming assignment was suitable work for Claimant. It was a light duty position that Claimant could perform, considering her age, education, work experience, and physical restrictions. The duty of programming telephones was light office work that did not require her to bend her neck or lift anything greater than ten pounds; at most, she was required to lift each telephone out of a box. RX-57; RX-85, p. 75, 163. The duties clearly fit within Dr. Conner's restrictions at that time. Claimant testified at the hearing that her restrictions at that time included no bending or stretching and that she was not to irritate her neck muscles. TR 68-69. Claimant's recollection of incorrect restrictions causes the Court to place little weight on her complaints that the assignment was beyond her physical capabilities. Because Claimant was offered suitable work at Employer's facility for a wage equal to, or in excess of, her pre-injury wage, the Court finds that Claimant suffered no loss of wage-earning capacity and has no economic disability as of November 15, 2000, the date she entered "leave without pay" status as a result of choosing to cease the assignment provided by Employer. 33 U.S.C. § 902(10).

The Court notes that Employer additionally showed suitable alternative employment in the July 11, 2004 labor market survey conducted by Ms. Abram. Ms. Abram reviewed the most recent physical restrictions and restricted her search to light duty jobs that allowed for changing positions and would not require lifting greater than ten pounds. RX-79. The Court finds this approach acceptable based on Dr. Conner's records that consistently indicated that Claimant was capable of desk jobs and maximum lifting of ten pounds and based on the June 2001 FCE that placed Claimant's physical capabilities in the light duty category. RX-50; RX-59; RX-74. Although Ms. Abram did not review Dr. Dowling's or Dr. Peltier's reports, the Court finds that the records were not necessary to her survey since neither doctor changed Ms. Hill's restrictions and, upon review of the records, Ms. Abram opined that her findings remained unchanged. TR 181-182. The Court finds Claimant capable of all listed cashier jobs, the research telephone interviewer position, the administrative clerk position, the library clerk position, all hotel desk clerk positions, and all storage rental clerk positions. The only position which the

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¹⁶ After Claimant refused to perform the job due to pain, Dr. Conner was consulted regarding the physical restrictions. His response explained that Ms. Hill was able to do light office work such as collating, stuffing binders and fire evacuation drawings, provided she had proper work space and was not required to lift boxes of supplies. RX-53.

Court does not find suitable is the light assembly position at Modine Heat Transfer. Without specific physical requirements listed, the Court finds that a job entailing an assembling function may require activity beyond Claimant's physical capacity. The wages of the suitable positions found by Ms. Abram ranged from \$5.15 to \$7.25 per hour. RX-79. In response, Claimant did not meet her burden of proving a diligent search and willingness to work. Claimant indicated inquiring about a temporary position at Walmart and position at McDonald's; however she did not submit an application for either position. TR 110-111. Claimant's failure to apply for a single job evidences that she did not diligently search for a job nor demonstrate a willingness to work.

In conclusion, Claimant was initially temporarily totally disabled as of November 5, 1999, the date Dr. Redman restricted her from all work as a result of her work injury. RX-12. Employer stipulated that Claimant was totally disabled from November 15, 1999 through May 17, 2000, the dates on which the records indicate she was paid disability compensation. RX-1; TR 47. Claimant again suffered no economic disability when she returned to work at light duty on May 18, 2000 and worked through July 13, 2000. RX-31; RX-40. Employer's records indicate that Claimant entered disability status on July 14, 2000, but was offered light duty work of which she was capable on August 10, 2000, at which point the Court finds she suffered no economic disability. RX-40; RX-81. She eventually returned to work on September 11, 2000. RX-49. She worked light duty assignments for Employer through November 15, 2000, when she entered "leave without pay" status due to her refusal to complete the telephone programming assignment. CX-3.

For the foregoing reasons, the Court finds that Claimant was temporarily totally disabled from November 5, 1999 through May 17, 2000 and from July 14, 2000 through August 10, 2000. She suffered no disability as of November 15, 2000, due to the availability of suitable alternative employment that would have resulted in no loss of wage-earning-capacity. Her disability became permanent on August 14, 2003.

AVERAGE WEEKLY WAGE

Section 10 of the Act, 33 U.S.C. § 10, sets forth three alternative methods for determining a claimant's average annual earnings, which are then divided by 52 pursuant to Section 10(d) in order to arrive at an average weekly wage. See Johnson v. Newport News Shipbuilding and Dry Dock Co., 25 BRBS 340 (1992). The determination of an employee's annual earnings must be based on substantial evidence. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 104 (1991).

Section 10(a) applies when an employee has worked in similar employment for substantially the whole of the year. <u>See</u> 33 U.S.C. § 910(a). The inquiry focuses on whether the employment was intermittent or permanent. <u>Gilliam v. Addison Crane Co.</u>, 21 BRBS 91 (1987); <u>Eleazer v. General Dynamics Corp.</u>, 7 BRBS 75 (1977). If the time in which the claimant was employed was permanent and steady, then §10(a) will apply.

See <u>Duncan v. Washington Metro. Area Transit and Auth.</u>, 24 BRBS 133, 136 (1990). The §10(a) formula requires the finding of an average daily wage and can only be utilized if the record contains evidence from which an average daily wage can be determined. Taylor v. Smith & Kelly Co., 14 BRBS 489, 494-95 (1981); <u>Todd Shipyards Corp. v. Director, OWCP</u>, 545 F.2d 1176, 1179, 5 BRBS 23, 26 (9th Cir. 1976). The Court finds Section 10(a) to be inapplicable because the record does not contain any evidence from which a daily wage can be determined.

Because Section 10(a) is not applicable, the Court will look to § 10(b). Section 10(b) calculates the average weekly wage based on similarly situated employees and applies when the injured employee did not work for substantially the whole of the year under § 10(a). See 33 U.S.C. § 910(b). Because no evidence was presented concerning the wages of a similarly situated employee, the Court finds that § 10(b) is also inapplicable to this case.

When both Sections 10(a) and (b) are inapplicable, the calculation of average weekly wage defaults to § 10(c), which allows the Court to calculate a claimant's average weekly wage in a manner that reflects a fair and reasonable approximation of the claimant's annual wage earning capacity at the time of his work injury. See 33 U.S.C. § 910(c). In determining earning capacity under § 10(c), "the administrative law judge must make a fair and accurate assessment of the injured employee's earning capacity, the amount that the employee would have the potential and opportunity of earning absent the injury." Empire United Stevedores v. Gatlin, 936 F.2d 819, 823, 25 BRBS 26, 29 (CRT) (5th Cir. 1991). The claimant's actual earnings at the time of injury does not control the administrative law judge's average weekly wage calculation under § 10(c), although they are factors to be considered. Id. An administrative law judge has significant discretion in determining the appropriate average wage, but must base the wage determination on adequate evidence in the record. See Staftex Staffing v. Director, OWCP, 237 F.3d 404, 406, 34 BRBS 44, 45 (CRT) (5th Cir. 2000); Taylor v. Smith & Kelly Co., 14 BRBS 489 (1981).

Employer provided evidence showing that from August 17, 1998 through August 25, 1999, Claimant earned \$11,242.77. RX-90. Employer divided this annual earning by 52 weeks to arrive at an average weekly wage of \$216.20. The Court finds this calculation to reflect a fair and accurate approximation of Claimant's earning capacity at the time of her injury and to be acceptable under § 10(c), a section under which the Court has wide discretion.

REASONABLE AND NECESSARY MEDICAL EXPENSES

Section 7(a) of the Act provides that:

(a) the employer shall furnish such medical, surgical, and other attendance or treatment, nurse or hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process or recovery may require. 33 U.S.C. § 907(a).

In order for a medical expense to be assessed against the employer, the expense must be both reasonable and necessary. Parnell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must be appropriate for the injury. 20 C.F.R. § 702.402. A claimant has established a prima facie case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-58 (1984). The claimant must establish that the medical expenses are related to the compensable injury. See Pardee v. Army & Air Force Exch. Serv., 13 BRBS 1130 (1981); see also Suppa v. Lehigh Valley R.R. Co., 13 BRBS 374 (1981). The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury, and not due to an intervening cause. See Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (5th Cir. 1981), aff'g 12 BRBS 65 (1980). An employee cannot receive reimbursement for medical expenses unless he has first requested authorization, prior to obtaining treatment, except in cases of emergency or refusal/neglect. 20 C.F.R. § 702.421; see also Shahady v. Atlas Tile & Marble Co., 682 F.2d 968 (D.C. Cir. 1982)(per curiam), rev'g 13 BRBS 1007 (1981), cert. denied, 459 U.S. 1146 (1983); McQuillen v. Horne Brothers Inc., 16 BRBS 10 (1983); Jackson v. Ingalls Shipbuilding, 15 BRBS 299 (1983).

Because Claimant has established that she suffers from chronic neck and shoulder pain due to her employment, she is entitled to all past and future compensable medical benefits arising from that condition, including evaluation for pain management as recommended by Dr. Dowling.

ATTORNEY'S FEES

Under Section 28(b) of the Act, when an employer voluntarily pays benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid by the employer. See 33 U.S.C. § 928(b); Moody v. Ingalls Shipbuilding, Inc., 27 BRBS 173, 176 (1993). Under Section 28(b) of the Act, when an employer voluntarily pays or tenders benefits and thereafter a controversy arises over additional compensation due, the employer will be liable for an attorney's fee if the claimant succeeds in obtaining greater compensation than that paid or tendered by employer. See

33 U.S.C. § 928(b); Moody, 27 BRBS at 176. In awarding a fee, the administrative law judge must take into account the quality of the representation, the complexity of the legal issues involved, and the amount of benefits awarded. 20 C.F.R. § 702.132; Muscella v. Sun Shipbuilding & Dry Dock Co., 12 BRBS 272 (1980).

In this case, Claimant has succeeded in obtaining past and future compensable medical benefits, including medical benefits for pain management treatment. For success on this limited issue, Claimant is entitled to reasonable attorney's fees to be paid by Employer.

Accordingly,

ORDER

It is hereby **ORDERED**, **ADJUDGED AND DECREED** that:

- 1) Employer/Carrier shall pay to Claimant compensation for temporary total disability from November 5, 1999 through May 17, 2000 and from July 14, 2000 through August 10, 2000, based on an average weekly wage of \$216.20.
- 2) Employer/Carrier shall pay to Claimant interest on any unpaid compensation benefits. The rate shall be calculated as of the date of this Order at the rate provided by 28 U.S.C. Section 1961.
- 3) Employer/Carrier shall be entitled to a credit for payments of compensation made to Claimant.
- 4) Employer/Carrier shall pay Claimant for all reasonable and necessary past and future compensable medical expenses that are the result of Claimant's employment-related neck, shoulder and arm injuries, including pain management evaluation.
- 5) All calculations necessary for the payment of this award are to be made by the OWCP District Director.

So ORDERED.

A RICHARD D. MILLS Adminsitrative Law Judge